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LEE M. HYMERLING
Section Chairman

Chairman's Report

The last 30 days have been marked by an incredible amount of Section activity, as well as activity which will profoundly influence family law practice in our state.

On February 27, our Section cosponsored an extremely successful program on tax aspects of divorce. Attended by more than 300 lawyers and accountants, the program featured Professor Frank E. A. Sander of the Harvard Law School. I have been advised that numerous checks had to be returned simply because the facilities could not accommodate all who sought to attend. Fortunately, the Institute for Continuing Legal Education is now making arrangements to sponsor taped replays of the program for late spring or early summer. The taped morning presentation will be accompanied by live discussion leaders. The enormous success of this program in no small measure is attributable to the many hours of hard work devoted by the program's coordinator, Section Executive Committee member Vince Segal of Cherry Hill. My thanks go not only to Vince but to all members of his Committee which included not only lawyers, but also representatives of the cosponsoring agency, the New Jersey Society of Certified Public Accountants. Parenthetically, you should be aware that an additional interdisciplinary program geared to both attorneys and accountants is now in the planning stages with a June target date for presentation.

I am also pleased to report that Professor Sander has expressed his willingness to return to New Jersey for a follow-up, more advanced session. Hopefully that program, which is also under

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Trustees Approve Section Report

The Board of Trustees of the New Jersey State Bar Association convened on February 26, 1982 and endorsed the proposed rule on matrimonial retainer agreements suggested by the NJSBA's Family Law Section, which rule would state: "In all matrimonial representations including those in the Juvenile and Domestic Relations Court and matrimonial actions as defined in R. 4:75, there shall be a written fee agreement signed by the attorney and the client who shall be given a copy."

Trustees also endorsed the Section's recommendation that a gloss or commentary should be attached to the Rule, stating in part that: "The rule is designed to encourage complete communication between attorney and client with regard to the scope of attorney's involvement in the matter as well as the method by which the litigation will be billed."

The proposed rule was developed by a committee of the Family Law Section chaired by Gary N. Skoloff, Esquire. Other committee members were Charles M. DeFuccio, Donald P. Gaydos, Lee M. Hymerling and Sidney I. Sawyer. The NJSBA proposal will be forwarded to the Supreme Court for consideration as a suggested replacement for the draft of proposed R. 1:21-7 (a) which had been previously circulated by the Supreme Court for discussion.

A copy of the Family Law Section Committee report is contained in the March 1, 1982 edition of the NJSBA's Trustee Report as well as this newsletter.

Dues Increase to Accommodate Family Lawyer

Due to the overwhelming growth and popularity of the *New Jersey Family Lawyer,* the Family Law Section Executive Committee has approved the publication of nine issues per year. As the result, it will be necessary to increase Section dues from $10 to $25 per year in order to accommodate publication expenses and assure the continued growth and excellence of the *New Jersey Family Lawyer* which has come to be recognized as akin to "required reading" under the direction and guidance of Alan M. Grosman, Barry I. Croland and their editorial staff.

The increased dues will become effective in the July 1, 1982-June 30, 1983 fiscal year.

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Chairman's Report *(continued)*

Section sponsorship through the aegis of ICLE, will come to fruition early next year.

Remaining on the ICLE front, our Section's membership should be aware that the Section will cosponsor with ICLE this fall the Second Biannual Symposium on Advanced Topics in Matrimonial Law. Introduced two years ago, the Biannual Symposium will accord all matrimonial practitioners an opportunity to hear distinguished speakers from throughout New Jersey address controversial and important topics of interest to all who practice family law. The First Biannual Symposium held in 1980 attracted considerable acclaim and drew specific praise within the body of the Final Phase 2 Report of the Pashman Committee. I am certain this year's edition will maintain the high standards of excellence set two years ago. As planning for the symposium evolves, you will be kept posted.

Earlier this month, the Section hosted its annual dinner meeting on March 10 at Mayfair Farms Restaurant in West Orange. I am pleased to report that the meeting attracted more Section members and more judges than ever in the past. The principal speakers were popular novelist Mary Higgins Clark and the Honorable Bertram Polow, Judge of the Superior Court, Appellate Division, who pinch-hit for retired Appellate Division Judge, Sidney Goldmann. Judge Polow delivered and amplified upon Judge Goldmann's moving comments about our late, beloved Standing Master, Saul Tischler, for whom the Section has named an annual award. This award for distinguished service in the area of matrimonial law will be conferred annually at our Section's March dinner meeting. The first recipient of this award will be announced in March, 1983.

Turning away from our Section's educational and social programs, the past month has seen considerable behind the scenes Section activity. On Friday, February 26, I appeared before a meeting of the Board of Trustees of the State Bar convened at Forsgate Country Club. As reported in a news article elsewhere in this issue, I presented to the trustees the final report of the committee chaired by Gary Skoloff which I had appointed to address proposed Rule 1:21-7(a). As promised in my column in the February issue, the full text of the Skoloff Committee report appears in this issue. The report has in toto been adopted as the official position of not only our Section, but of the State Bar as a whole. Let me here publicly express my gratitude to President Octavius Orbe and the officers and trustees of the State Bar for their expression of support. The report has now been forwarded to the Supreme Court. I am hopeful the Court will carefully consider our recommendations and will choose to withdraw the original proposed Rule in favor of the far simpler and less intrusive alternate Rule endorsed by our Section.

The trustees also approved a recommendation made by our Section's Executive Committee to raise Section dues by $15. Effective with the 1982-1983 year, Section dues will increase to $25 in order to finance the continued publication of the *New Jersey Family Lawyer.* The decision of your Section's leadership to raise dues was not made lightly; instead, it was in recognition of the fact that those who receive and benefit from the *Family Lawyer* should be the principal source of its funding. Recognizing the quality of the publication and the fact that its cost, inclusive of Section membership, is still far less than many other publications available in the field, I feel that even the new dues level is modest. Your officers and Executive Committee hope this dues increase will not cause a loss of membership. Our intention is to continue the excellent program of Section educational activities, as well as the *Family Lawyer,* into the future. Indeed, the dues increase confers with it a heavy responsibility to continue the great work that has already been begun.

Legislative Activity Intensified

The past month has also been marked by a considerable increase in our Section's legislative activity. As many of you know, last year the Commission on Sex Discrimination in the Statutes released a comprehensive report suggesting numerous legislative changes in substantive law affecting the family. Bills originally proposed by the Commission have now been introduced into the Legislature by the Commission's Chairman, Senator Wynona M. Lipman of Newark. Many of you will recall that Senator Lipman was our Section's guest at its May, 1981 meeting. Following that meeting, a dialogue commenced between representatives of the Commission and our Section. That dialogue eventually resulted in adoption of Senate Bill 1508, the New Jersey Enforcement of Support Act which will shortly become effective. By the same token, our Section also found it necessary to oppose another bill endorsed by the Commission which would have created in the Section's view inappropriate legislative standards for the award of alimony in general and rehabilitative alimony in particular. Indeed, that legislation if adopted would have abolished "need" and "ability to pay" as appropriate standards for the award of spousal and child support. Notwithstanding the adoption of this legislation by both houses of the Legislature, as a result of the dedicated work by many Section members and the endorsement of our Section's Executive Committee and the State Bar Trustees, this damaging legislation was vetoed by former Governor Byrne shortly before he left office.

Your Section officers understand, however, that it is far preferable to work within and with the Legislature than to simply oppose legislation already adopted by the General Assembly and Senate. It was thus with great pleasure, on behalf

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Recent Cases

by Myra T. Peterson

CUSTODY—Purpose of Uniform Child Custody Jurisdiction Act is to promote cooperation between states to serve best interest of children —Trial court should hold plenary hearing and contact sister state court to decide which forum is appropriate in custody hearing.

The parties involved were married in Nebraska in 1972. They moved to New Jersey where they lived together until their separation in July, 1980 when their children were five months of age and three years of age. When the parties separated, the plaintiff took the children to her parents' home in Nebraska, took one of two automobiles and half of the parties' savings. The defendant subsequently sent the plaintiff's personal effects and the children's belongings to her in Nebraska.

The plaintiff left New Jersey on July 25, 1980 and five days later she obtained a temporary custody order from a Nebraska court. The defendant had received notice of the Nebraska proceeding but made no appearanace nor did he contest the proceeding.

On December 11, 1980, the Nebraska court ordered a "legal separation," awarded custody of the children to the plaintiff, and directed that the children not be removed from Nebraska. The defendant did not appear or contest that adjudication.

On December 31, 1980, the plaintiff instituted a separate maintenance action in New Jersey and moved for *pendente lite* support. The defendant cross-moved for joint custody and other relief.

The trial court determined the matter upon certifications and oral argument. The court characterized the matter as a "child snatching," a jurisdictional "shouting match," refused to recognize the Nebraska custody order, and concluded that under the Uniform Child Custody Jurisdiction Act [UCCDA], that Nebraska did not have the jurisdictional prerequisites to adjudicate the matter.

The plaintiff moved for leave to appeal the interlocutory order. The Appellate Division, criticizing the trial court, remanded.

The Appellate Division found that the New Jersey trial court "did not consider critical factual issues which must be resolved to determine whether New Jersey courts should accept or decline jurisdiction and . . . failed to follow certain procedural prerequisites mandated by the statute." The appellate court held that the trial judge should have held a plenary hearing and made "specific factual findings to determine whether the 'interest of the child[ren]' dictates the conclusion that Nebraska is a more appropriate forum" *even if there exists in New Jersey the jurisdiction to initially make or modify a decree.* According to the Appellate Division, the trial court should also have stayed the New Jersey proceeding and contacted the Nebraska Court in an attempt "to reach agreement as to the more appropriate forum with the ultimate aim of providing protection and control, in both states, to assure compliance with custody and visitation orders entered in one of them."

The Appellate Division stated that a key purpose of the UCCDA is to promote cooperation in the interest of children and implicitly suggested that this had not been accomplished in the case *sub judice.*

[Comment: Factors which may have influenced the appellate court were the defendant's tacit acceptance of residence in Nebraska by the plaintiff and the children as shown by his sending to them their clothing and other needs, his sending support—albeit minimal—to the plaintiff in Nebraska, his failure to appear or contest the Nebraska proceedings, and his acquiescence to the situation until the plaintiff moved in New Jersey for support.

If one focuses on the purpose of the UCCDA—to prevent "child snatching," to determine the correct jurisdiction of a forum for a custody dispute, and to promote the best interest of children involved—the reason for the Appellate Division remand is clear. The New Jersey trial court's determination based on the papers and oral argument that the plaintiff had "snatched" the children from New Jersey, that Nebraska did not have jurisdiction to adjudicate the matter, the trial court's failure to examine the motives of the parties and its failure, despite the mandate of the UCCDA that there be a stay of a second proceeding until contact is made with the court in the state of the first proceeding in an attempt at cooperation, clearly were in derogation of the UCCDA, according to the Appellate Division, and the court correctly so held.]

Bowden v. Bowden (A-3262-80T2, Bischoff, King, Polow, J.J.A.D., Dec. Jan. 11, 1982).

MARITAL TORT—Jury trial is not mandated for marital tort which, pursuant to Tevis, must be tried with matrimonial case.

In a succinct opinion written to "provide judicial precedent . . . and . . . to facilitate any appellate review," Judge Serpentelli ruled that a jury trial is not mandated for a spouse's claim of intentional tort when that claim is tried, as it must be pursuant to *Tevis v. Tevis,* 79 N.J. 422 (1978), with the matrimonial action. The Court acknowledged reliance upon the recommendations contained in *Supreme Court Committee on Matrimonial Litigation, Phase II Final Report* which had not been implemented at the time of its decision and the subcommittee report upon which the Final Report was based.

[Comment: The subcommittee report underlying the recommendations contained in the Final Report extensively examined the potential Constitutional issue raised by the denial of a trial by jury to an aggrieved, litigating matrimonial

spouse, the inherent jurisdiction of the equity court to decide legal issues "ancillary and incidental" to a trial in equity, the question of whether a marital tort is indeed an issue ancillary and incidental to a divorce action, and the relationship between the money damages that might be awarded to a spouse because of such claim and equitable distribution. The subcommittee concluded that the 1947 New Jersey Constitution preserved the right to a trial by jury as contained in the 1776 Constitution which preserved the right to a trial by jury as existed at common law. The subcommittee also concluded that there existed a common law right to a trial by jury as to a battery action.

(It should be noted that until the enactment of the Married Women's Act in 1874 (revised 1877), a cause of action in tort against a spouse was precluded and the right to a cause of action against a spouse developed slowly after that enactment. Case law shows that recovery was permitted primarily for intentional torts directed to property or property rights.)

Although the subcommittee concluded that there was a theoretical right to a jury trial with respect to a marital tort, the subcommitte determined that the existence of the theoretical right "in no way ends the inquiry." Evaluation was necessary as to whether the "inherent jurisdictional power of a court of equity will permit it to dispose of legal issues incidental and ancillary to the main dispute in the cause without the necessity to provide a jury trial." As to this issue, the subcommittee concluded that the implicit indications in Mantell v. International Plastic Harmonica Corp. *14 N.J. Eq. 379 (E. & A. 1947), and* Steiner v. Stein, *2 N.J. 367 (1949) and the explicit statements in* Fleischer v. James Drug Stores, *1 N.J. 138 (1948) and* Ebling Brewing Co. v. Heirloom, Inc., *1 N.J. 71 (1948) specifically give authority for the court's jurisdiction to resolve all issues before it without the necessity of providing a jury trial.*

Since a court of equity has jurisdiction over issues ancillary and incidental to the main litigation without need for a jury trial as to those issues, the subcommittee noted that the test as to whether an issue is incidental or ancillary is, as stated in Fleischer, supra,: *"if the matters to be adjusted be germane or grow out of the subject matter of the equitable jurisdiction."*

Said the subcommittee:

> *With respect to the* Tevis *situation, same would not seem to be difficult. Indeed, the Supreme Court has already characterized the tort action as a "marital tort," thus indicating its nexus to the matrimonial action.*

The subcommittee concluded that "if the action is one sounding in extreme cruelty, the same issues would be tried in the divorce action and the tort action," and "[s]ince the tort action will involve an award of assets from one spouse to the other, it is a division of assets type matter."

On a practical level and balancing the equities, Judge Serpentelli's decision is sound. The present law which gives spouses a fair division of assets can adequately compensate a wronged spouse. The marital wrong can be considered vis-a-vis an alimony award. The seriousness of the claim can be more fairly dealt with by an experienced trial judge who deals with marital wrongs daily than a jury whose perceptions may be less acute and whose partiality, inexperience and prejudice more susceptible to emotionalism and sensationalism. A non-jury trial and trial of all issues together promotes more orderly administration of justice and comports with the practical considerations of courtroom space and the design of equity courtrooms.]

Davis v. Davis, M-6605-79 (Chan. Div., Ocean County, Serpentelli, J.S.C., Dec. July 31, 1981).

PRIOR DIVORCE—In wrongful death action, irrespective of the factual context in which the issue may arise, the last of two marriages is presumptively valid—party attacking marriage after prior divorce bears burden of rebutting presumption.

In 1962, plaintiff obtained an uncontested Mexican divorce. In 1970 she married a second time and that marriage ended in 1973 with a New Jersey uncontested divorce. Later that year, the plaintiff married the decedent. At the time of the last marriage, the husband-decedent had a 17-year-old son of a prior marriage. In 1975, when the son was 19, the decedent was killed in an automobile accident. The plaintiff was named administratrix of the estate. In accordance with the intestacy statute then in effect, N.J.S.A. 3A:4-2, the plaintiff received one-third, and the son two-thirds, of the estate.

The plaintiff was also appointed as administratrix ad prosequendum to pursue a wrongful death action under N.J.S.A. 2A:31-1. As a result of that action, $100,000 was paid into court. Because the plaintiff and the decedent's son could not agree upon division of the net proceeds, the court ordered a hearing. At the hearing, although questions were asked of the plaintiff as to her Mexican divorce, the son offered no evidence attacking that divorce. The trial court upheld the validity of the plaintiff's marriage to the decedent and, thus, of the Mexican divorce. The Appellate Division, however, reversed and remanded for a plenary hearing on the validity of the Mexican divorce and the application of estoppel and laches.

The Supreme Court granted certification and reversed in part and affirmed in part. (The affirmance deals with issues as to the son's emancipation and will not be discussed herein.) The Court held that there is a presumptive validity to a foreign divorce and that the Appellate Division "misapprehended that the benefit of the presumption was restricted to claims by widows in workmen's compensation death cases" and that the presumption should have applied in this—a Wrongful Death—case.

Recent Cases *(continued)*

Said the Court:

> [The parties] considered themselves husband and wife. They participated in a ceremonial marriage and lived and traveled together. They filed joint tax returns . . . Financially, socially and in the eyes of the world, they were married; the law also viewed them as husband and wife. Where marital partners have engaged in prior marriages, a strong presumption supports the validity of their prior divorces and the last marriage. *Kazin v. Kazin,* 81 *N.J.* 85, 96 (1979). Reasons for the presumption are readily apparent. The presumption reflects a belief that parties would not willingly commit bigamy or illegitimize their children. *Sparks v. Ross,* 72 *N.J. Eq.* 762, 765 (Ch. 1907), aff'd, 75 *N.J. Eq.* 550 (E. & A. 1909). The presumptive validity of the latest of multiple ceremonial marriages comports with the expectation of marital partners and lends stability to human affairs. Increasing incidences of divorce and remarriage strengthen the continuing need for the presumption.
>
> One attacking the validity of the most recent of multiple marriages is under a heavy burden to establish its invalidity by clear and convincing evidence. *Kazin v. Kazin, supra,* 81 *N.J.* at 96. Furthermore, the challenger must meet that burden not only with respect to the occurrence and validity of a prior marriage at the time it was entered, but also its continuing validity at the time of the challenged marriage. *Dawson v. Hatfield Wire & Cable Co., supra,* 59 *N.J.* at 193. The challenger must disprove every reasonable possibility that could vitiate the prior marriage. *Id.* at 205-206.
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> We hold, therefore, that irrespective of the factual context in which the issue may arise, the last of two or more marriages is presumptively valid. The presumption of validity may be overcome only by clear and convincing evidence that (1) there was a prior marriage, (2) the prior marriage was valid, and (3) the prior marriage was not terminated by death or divorce before the latest marriage. We hold further that, where one attacks the validity of a divorce obtained in a foreign state or country, the challenger must prove all asserted defects, including lack of jurisdiction in the foreign court. In all respects, the burden rests not upon the party defending the most recent marriage, but upon the challenger to demonstrate invalidity of the prior divorce.

In a short concurrence, Justice Pashman stated that the statutory definition of heirs-at-law should be expanded to include one who was a de facto spouse, although not legally married to the other spouse because of a technical defect, vis-a-vis the Wrongful Death Act and that making the benefits of the Act available to de facto spouses who have actually been living with and dependent upon the decedent serves the remedial purposes of the Act.

In a separate concurrence, Justice Handler stated that:

> the rule invoked by the majority—the presumption of validity of the last of several ceremonial marriages and the sufficiency of proofs to overcome that presumption—is neither apt nor adequate to determine the legal status of the claimants as beneficiaries under the Wrongful Death Act.

Justice Handler stated that the majority opinion gave "no legal effect" to the Mexican divorce and an adjudication in a case such as the case at bar "should be based upon the application of equitable principles because we are dealing with a matrimonial event. . . ." Justice Handler would have expanded the bounds of the doctrine of estoppel since:

> fairness and equity may demand that, after the passage of so many years and the absence of any showing of knowingly wrongful conduct on the procuring party's part, such longsettled matters should now be beyond attack.

As to the case *sub judice,* Justice Handler noted that:

> Estoppel should be invoked to resolve the controversy because an analysis based upon the equities would provide greater clarity and sureness as to the result reached.

As to the larger public policy issue, Justice Handler noted the need for regard for the realities of the marital relationship and the expeditious, orderly and fair dissolution of destroyed marriages. There is no point in resurrecting dead marriages, even if the procedural dissolution of such marriages " 'are not completely consistent with our own.' "

The majority noted that Justice Pashman's approach was too broad since:

> the test as to the spousal relationship would not be the same as in the area of familial law where questions of property, inheritance, legitimacy of offspring and the like rightly demand a more rigid adherence to conventional doctrine. ". . . We continue to adhere to that principle and decline to find a wife-in-fact to be an 'heir'."

As to Justice Handler's espousal of an expansion of the doctrine of estoppel, the majority noted that in the case *sub judice,* reliance on equitable estoppel would place on the plaintiff the burden of proving that the son should be estopped while the result reached by the majority "properly places the burden of proof on the one seeking to upset a settled relationship by challenging the validity of the marriage." To

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Matrimonial Tax Seminar Scores Success

As many readers are already aware, the Family Law Section in conjunction with the New Jersey Society of Certified Public Accountants and the Institute of Continuing Legal Education presented a major matrimonial seminar and workshop program on Saturday, February 27, 1982 at the Landmark Inn in Woodbridge, New Jersey. In addition to the 315 persons attending, over 150 other applicants had to be turned away due to the overwhelming response by members of the bench and bar of our state.

The featured and initial speaker was Professor Frank E. A. Sander from the Harvard Law School. Professor Sander delivered an approximate two-hour presentation which discussed or touched upon almost every aspect of the multi-faceted area of matrimonial tax law and planning. Professor Sander stressed the availability of freedom for such planning under the pertinent I.R.S. Code provisions, Regulations, and court decisions and punctuated his remarks by reference to unnecessary "pathology" examples resulting from the lack of matrimonial tax planning. He further stressed the importance of a sound and reasoned judgmental factor as a cornerstone of matrimonial tax planning.

Viewed within the context of reasoned judgment and sound planning, Professor Sander went on to discuss the tax consequences of alimony, child support, division of marital property, counsel fees and recent judicial and legislative activity in Oregon and Illinois in the ever recurring "Davis" arena resulting from the intraspousal transfer of separate or jointly titled marital assets during divorce.

Professor Sander was followed by the Honorable Virginia A. Long, J.S.C., who discussed the atunement of the bench to matrimonial tax problems with specific suggestions as to how matrimonial attorneys should present such issues to the court for determination. Judge Long stressed the primary responsibility of attorneys to identify the tax issues and present information and materials supportive of their position at time of final hearing. She emphasized the direct relationship between an attorney's level of expertise in such areas and the quality of input to the court, noting that while all matrimonial judges which to be authoritatively advised of tax consequences (particularly in the area of intraspousal property transfers), it is the primary obligation and responsibility of the attorneys to identify and adequately present such matters to the court.

Judge Long was followed by Raymond Silverstein, C.P.A., from Cherry Hill who discussed the certified accountants function in divorce and separation cases. Whether in the area of tax planning or trial, Mr. Silverstein stressed the need for careful selection of an accountant possessing the qualities of technical competence, investigative skills, innovative planning and forensic skills, including the ability to testify in a clear and credible manner. On the other hand, Mr. Silverstein suggested that a matrimonial accountant is not akin to a "detective" and that all attorneys have a responsibility to issue whatever guidelines, or limitations, might be appropriate in a particular case with due consideration to the cost effectiveness of an accountant's involvement in the proceedings.

Following a lunch break, the next speaker was Thomas S. Forkin, Esquire from Cherry Hill who discussed tax considerations for the practicing lawyer in the areas of income, capital gains and gift taxes, as well as an extremely thorough analysis of the complex area of stock redemption in the matrimonial setting. Mr. Forkin highlighted the need for all attorneys dealing in this thorny area to be well versed with Sections 318 and 302 of the Internal Revenue Code to the extent that they can clearly identify the nature of the problem and make an informed decision to proceed independently or consult with independent tax counsel in this sophisticated area of matrimonial tax law and planning. Mr. Forkin concluded his comments by discussing the inherent tax consequences of "unrealized" appreciation of marital assets and indicated the need for careful consideration of future taxes and whether such tax results are simply speculative or whether consideration of deferred taxes should be an integral part of a comprehensive marital settlement or presentation to the court at time of final hearing. Highlighting New Jersey case law, I.R.S. Revenue Rulings and Accounting Principal Board opinions, Mr. Forkin concluded that it is improvident and unwise to simply determine that deferred tax consequences are speculative and not worthy of consideration; to the contrary, he stressed the need to incorporate such issues into the areas of matrimonial tax planning, negotiations and especially litigation, so that the court will be aware of the potential tax consequences resulting from a division of business or business-related assets.

Following Mr. Forkin, the attendees were assigned to various workshops chaired by an attorney or C.P.A. in order that the various issues and problems raised by the above speakers could be explored and examined by the exchange of ideas in an informal setting. The workshop portion of the program was an effective and successful conclusion to the day's activities.

Special recognition should be given to Lee M. Hymerling, Esquire, who was instrumental in conceiving the program and Vincent D. Segal, Esquire, who was directly responsible for planning and direction of this hugely successful event.

Family Law Section Officers

Lee M. Hymerling . . . . . Chairman
Jeffrey P. Weinstein. . . . . Vice-Chairman
David M. Wildstein . . . . . Secretary

Beck v. Beck: Joint Custody as an Alternative

by The Hon. Samuel G. DeSimone

On July 2, 1981 the New Jersey Supreme Court specifically approved the concept of joint custody in the abstract as "the preferred disposition in some matrimonial actions."[1] The New Jersey Supreme Court became the first court of last resort in this country to give specific guidelines that must be followed before an award of joint custody may be made.[2]

The Court cited N.J.S.A. 2A:34-23 in noting the legislative intent to provide the courts with broad authorization for custody determinations in divorce proceedings:[3] "The court may make such order . . . as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the case shall render fit, reasonable and just. . ."

The parties in *Beck* were married in 1963. The children were two adopted girls, age 11 and 9. In February, 1976 plaintiff husband moved out of the home. In September, 1977 he instituted suit under no-fault grounds. His complaint made no formal demand for custody of the children. He asked for reasonable and liberal visitation rights with the children. The defendant wife counterclaimed for divorce based on desertion grounds. She specifically sought custody.

The trial judge ordered that both legal and physical custody be shared. The children were to be with each parent for four continuous months with visitation with the other parent every other weekend.

The Appellate Division, on appeal by the defendant wife, held it was improper to commit two minor children to joint custody or a time-sharing schedule.[4] This opinion noted that the children had been raised in an "adequate manner" for more than four years since the father deserted her.

The Supreme Court's reversal of the Appellate Division upheld the trial judge's determination of joint custody. The opinion stated that sole custody tends to isolate children from the noncustodial parent while placing heavy financial and emotional burdens on the sole caretaker.[6]

> "Joint custody attempts to solve some of the problems of sole custody by providing the child with access to both parents and granting parents equal rights and responsibilities regarding their children."[7]

Joint custody is comprised of two elements, legal and physical custody. Legal custody is the legal authority and responsibility for making "major" decisions regarding the child's welfare being shared at all times by both parents. Physical custody is the logistical arrangement whereby the parents share the companionship of the child and are responsibile for "minor" day-to-day decisions.[8]

The Court recognized that joint custody is acceptable in only a limited class of cases after meticulous fact-finding. The premise of a joint custody arrangement is the assumption that children in a unified family setting develop attachments to both parents. The Court noted that the severance of either of these attachments is contrary to the child's best interests.

The conditions necessary for awarding joint custody are:

1. The child recognizes both parents as sources of security and love and wishes to continue the relationship;
2. Both parents must be physically and psychologically capable of parenting;
3. Each parent must desire custody, though they may oppose joint custody;
4. The parents must be capable of enough cooperation to facilitate arrangements and reduce emotional stress on the child;
5. Effective methods of enforcements must be available;
6. Joint custody must be practical geographically and financially, school arrangements must be workable, contacts with friends and relatives must be maintained; and
7. The child's preferences must be given due weights.[10]

The practical considerations of physical custody are 1) the financial status of the parents, 2) the proximity of their respective homes, 3) the demands of parental employment and 4) the age and number of the children.[11]

The *Beck* decision is consistent with the custody recommendations expressed by the Supreme Court's Committee on Matrimonial Litigation, Phase Two Final Report, chaired by Justice Pashman.[12] The committee recommended that the strict "possessory" notion of custody should be rejected. It was recommended that any refinement of this shift in philosophy is best left to development by case law.

In recommending this change the committee stated that the very word custody is interpreted by litigants to mean ownership of the child by one

Hon. Samuel G. DeSimone

The Hon. Samuel G. DeSimone is a Superior Court Judge assigned to the Chancery Division in Gloucester County.

Beck v. Beck *(continued)*

parent. The Pashman Report noted that the family structure has changed to such an extent that New Jersey Custody Law was no longer appropriate.

The Pashman Report realized that in order for a child to grow into a well-adjusted adult, his emotional and psychological factors must be forwarded. This will enable the child to enter and maintain satisfying relationships with his own family.

The *Beck* decision and the Pashman Report recognize the trend towards a typical household of two working adults with child-raising functions allocated between them. This results in meaningful relationships between each parent and child. The Report recommends that special relationships developed with each parent may suffer if their contact with one parent is unduly restricted following a divorce.[13]

The *Beck* decision declined to establish a presumption in favor of joint custody. Also, the problem of the financial positions of the parents is estimated by some economists as requiring up to 25% more available income than a sole custody/visitation arrangement.

The standard of appellate review was reiterated in *Beck.* The Court stated clearly that where the trial court's determination is supported by "sufficient credible evidence," it must be sustained on appeal. This requires the family law practitioner to prepare a persuasive custody case at the trial level. Absent a significant posttrial event that would warrant supplementing the record, the New Jersey custody applicant will have only one chance to present his or her case.

In 1981 Civil Practice Rule 4:79-8, concerning custody of children was amended. The first of these changes regarding the matrimonial litigation rules made the ordering of a probation report discretionary with the court. This change will permit the court to eliminate probation investigations where the custody dispute is neither genuine nor substantial. This will promote better reports in a shorter period of time.[14]

Also, C.P.R. 4:79-8 allows the court to continue any matrimonial action for the purpose of a custody investigation. This investigation shall not deny the granting of temporary relief of alimony or child support. Such investigation of the parties shall be conducted by the probation office of the county of venue notwithstanding that one of the parties may live in another county.[15] This rule promotes the consolidation of matrimonial cases in one venue where the court has jurisdiction to decide all issues.

The combination of the *Beck* decision, the Pashman Report on Matrimonial Litigation, and the change in matrimonial rules have once again established New Jersey as a progressive state in legal reform. With the *Beck* decision the Supreme Court has rejected the notion that divorce dissolves the family as well as the marriage. It encourages a trial court to be creative in its approach to a custody determination in order to preserve as much contact, responsibility, and psychological relationship between parent and child.

Footnotes

1. Beck v. Beck 86 *N.J.* 480 (1981).
2. Peterson, *Beck v. Beck* 108 NEW JERSEY LAW JOURNAL 269, (September 24, 1980).
3. Beck at 485.
4. *Beck v. Beck* 173 N.J. Super 33 (App. Div. 1980).
5. *Id.* at 43.
6. 86 *N.J.* at 486.
7. 86 *N.J.* at 486.
8. 86 *N.J.* at 486-7.
9. 86 *N.J.* at 487.
10. *Custody,* 13 JUVENILE and FAMILY LAW DIGEST 11, (Nov. 1981) p. 343-7.
11. 86 *N.J.* at 500.
12. 108 N.J.L.J. Supplement, p. 8-9 (July 16, 1981).
13. *Id.* at p. 9.
14. C.P.R. 4:79-8(a) Comment.
15. C.P.R. 4:79-8(a).

Recent Cases

(continued from page 101)

further demonstrate the inapplicability of the expansion of the doctrine of estoppel, the majority noted that in the case *sub judice,* the son was a minor at the time of his father's marriage to the plaintiff, "nothing indicates that the son could have prevented the marriage" and since there is no evidence that [the plaintiff] changed her position for the worse in reliance upon anything [the son] said or did," there was no detriment to the plaintiff because of the son's delay in challenging the foreign divorce.

[Comment: The decision in this case demonstrates that one may be considered married for some purposes and not for others. If, as the majority states, there should be a more rigid adherence to technicalities for intestacy purpose, theoretically the son, in the above case, might have won the entire estate were an action commenced challenging the plaintiff's right to receive under the intestacy statute, and lost as to the Wrongful Death action. If anything, the majority opinion demonstrates the need to plead and try all issues in any matter involving a second marriage.]

Newburgh, etc. v. Arrigo, et al. (A-2, Justice Pollock writing for the majority, Dec. Feb. 23, 1982).

Report of Skoloff Committee on Retainer Agreement Rule

February 5, 1982

Lee M. Hymerling, Chairman
Family Law Section, N.J.
State Bar Association
Archer, Greiner & Read
A Professional Corporation
One Centennial Square
Haddonfield, New Jersey 08033

Reference: Proposed Rule on Retainer Agreements in Matrimonial Actions—R. 1:21-7(a)

Dear Lee:

You will recall that as a result of the action of the New Jersey Supreme Court and the Administrative Office of the Courts with reference to a proposed rule on retainer agreements in matrimonial actions, you appointed me as Chairman of a special committee to report to the Family Law Section of the New Jersey State Bar Association with reference to the proposed rule R. 1:21-7(a).

The committee, from its review of all of the facts made available to it, as well as from an intimate knowledge of matrimonial practice, concludes that a mandatory rule is not necessary. Each year, more than 30,000 matrimonial matters are filed in the Superior Court, as well as more than 90,000 filings in the Domestic Relations Court. In addition, both courts are plagued with innumerable post-judgment proceedings. Conservatively, these statistics suggest that each year more than 100,000 matrimonial representations take place, recognizing that many matters include the involvement of counsel representing both litigants.

These statistics must be contrasted to the relative paucity of matters handled to date by District Fee Arbitration Committees. In 1980, these committees handled only 660 complaints. In 1981, statistics from 11 of the 12 committees reveal a total of 697 inquiries. That figure must be substantially discounted as follows: From the 697 inquiries, 122 form complaints were not returned by the prospective complainant. Of the 575 complaints submitted to arbitration, 222 or 39% involved matrimonial matters. The gross figure of 575 must further be reduced because 15 of the complaints were withdrawn by the parties prior to hearing and 46 were settled by the parties. Accordingly, only 501 complaints filed in 1981 were formally addressed for panel consideration. Thus far, 188 have been processed and concluded, and 313 remain pending.

Of the 188 matters processed (involving both matrimonial and other representations), in 96 instances the original fee charged by the attorney was upheld; in 92 instances the fee was reduced.

Of the 90 matrimonial matters arbitrated stemming from 1981 complaints, in 44 instances the fee was upheld and in 46 instances the fee was reduced.

Of the 313 matters which remain pending, 132 stem from matrimonial representations.

These statistics bear out the committee's finding that in many cases presented to fee arbitration committees, no valid fee dispute exists. Undoubtedly many of the complaints are based upon a result-oriented situation wherein the client is frustrated by the final determination or settlement of the case. Clearly, matrimonial litigation is marked by greater personal involvement, emotion, frustration and bitterness than is any other area of the law.

This analysis of the objective facts conclusively reveals that the proposed rule cannot be objectively justified on the basis of past history. Matrimonial fee disputes seem to arise in only approximately 1/10 of 1% of the representations involved in our state.

Nonetheless, although the objective facts suggest that no need exists for the rule, we endorse the Supreme Court's desire to assure clients that they are aware of the fee basis between the client and the attorney. We observe, however, that in adopting such a rule, the Court must be mindful of the inherent costs the rule will entail and the risk that the rule itself will spawn more fee disputes than now exist. Notwithstanding these concerns, the committee does endorse the adoption of such a rule.

This committee does, however, have serious misgivings concerning the proposed draft of R. 1:47(a). Specifically, the committee believes that:

1. The reference to the Juvenile and Domestic Relations Court should be deleted because this rule should apply only to matrimonial actions and not to the quasi-criminal juvenile actions that are so often pending in that court.

2. The committee concludes that it is impossible to estimate the total fee because of the inability of the attorney or the client at the commencement of an action to project whether or not the other side will be "reasonable." In other words, most attorneys take the view that they have too often predicted wrong with reference to the length of time a case will take, sometimes concluding that it will be a long, bitter contested battle and it is settled amicably early, and other times assuming there will be an early amicable settlement and to the contrary the case ends up with many days of litigation and many motions.

3. The committee is critical of the reference to a billing rate for the types of legal services, since the majority of attorneys in the State of New Jersey charge one hourly rate for matrimonial actions and do not distinguish between various types of services. The committee has been unable to conclude that a particular type of service is worth more or less money than another type of service. The concern of many members of the committee is that if a higher premium were paid upon appearances in court, it would encourage exactly that which the Pashman Committee has worked

Report of Skoloff Committee *(continued)*

so hard to discourage; namely, many, many court appearances and much, much litigation that might be avoided by more concerted effort on early settlements and more time spent in negotiations within an attorney's office.

4. Expenses. The committee concludes that expenses are not unique to matrimonial actions, but arise in all types of actions and therefore will be handled in the same proper manner as attorneys handle this item in all other types of litigated matters.

5. The committee disagrees with the proposal within the rule that the agreement shall state what services are not covered by the agreement. It is impossible to define what services will not be covered in an agreement because of the fact that there are a multitude of problems that may arise; and since attorneys handle matrimonial actions on an hourly basis, they will either agree that the matrimonial attorney will handle a particular type of problem or else another outside attorney will be retained and the client will simply be paying the same on a similar hourly rate in any matter.

6. Initial retainer. The committee disagrees with the statement that the rule should set forth whether the initial retainer is to be applied against the rates established or in addition thereto, simply because the rule should be flexible enough to allow a variety of provisions as long as they are agreed upon between the attorney and the client, and the client clearly understands precisely what the agreement shall be. The committee takes the same view of the proposed provision as to whether or not there shall be a maximum rate established for services covered and for the effect of any application for counsel fees under R. 4:42-9(a). The committee simply does not agree that this degree of specificity is necessary under the rule and will most likely create more problems than it will solve. The committee feels that the real danger under the proposed rule is that an agreement will be drafted so lengthy and so complex that it will create in the client's mind at the first meeting with the attorney a doubt as to who the real adversary may be—the other spouse or the attorney sitting on the other side of the desk.

From a review of the above, it should be obvious that the committee cannot and does not endorse the draft advanced by the Supreme Court. The committee does not intend this to indicate a criticism; it applauds the fact that the Supreme Court did not simply propound a rule, but instead submitted a draft proposed rule for comment.

Based upon the above, the rule this committee endorses is as follows:

> IN ALL MATRIMONIAL REPRESENTATIONS INCLUDING THOSE IN THE JUVENILE AND DOMESTIC RELATIONS COURT AND MATRIMONIAL ACTIONS AS DEFINED IN R. 4:75, THERE SHALL BE A WRITTEN FEE AGREEMENT SIGNED BY THE ATTORNEY AND THE BY CLIENT WHO SHALL BE GIVEN A COPY.

The committee specifically recommends that were such a rule to be propounded, a gloss or commentary should be attached to it. The committee proposes the following commentary which closely parallels the original commentary prepared by the Administrative Office of the Courts:

> The rule is designed to require written retainer agreements in matrimonial actions as a means of clarifying the scope of the attorney-client relationship and in order to define the fee arrangements that are to apply to a given representation.
>
> The rule is designed to encourage complete communication between attorney and client with regard to the scope of the attorney's involvement in a matter, as well as the method by which the litigation will be billed.
>
> Such agreements may address such topics as the billing rate for the type of legal services rendered (i.e., legal research, correspondence, telephone calls, drafting, court appearances, retention of experts and other matters), as well as a statement as to who is to bear incidental expenses. Such agreements may also include specificity as to when payment is expected; whether late interest will be charged; what services, if any, are not covered by the agreement; and whether any part of the initial retainer is to be applied against the rates established or is in addition thereto. Such agreements may also include a statement as to whether a maximum rate has been established for services covered, as well as the effect of any application for counsel fees under R. 4:42-9(a).
>
> The agreement must be in writing, but need not follow a specific form. It may be styled as a formal agreement or, when appropriate, as a letter endorsed by the client.
>
> The rule applies to all representations in connection with the litigation, either contemplated or actual, in the Chancery Division or in the Juvenile & Domestic Relations Court.

Respectfully submitted,

GARY N. SKOLOFF
Chair

Charles M. De Fuccio
Donald P. Gaydos
Lee M. Hymerling
Sidney I. Sawyer

Beard v. Commissioner—An Overview

by John S. Eory

Every matrimonial lawyer has faced, or should be aware of, the significant tax consequences resulting from an interspousal transfer of separately titled property during a divorce. Following the Supreme Court's decision in *U.S. v. Davis,* 370 U.S. 65 (1962) it now appears clear that a transfer by one spouse of appreciated property to the other pursuant to a divorce decree or separation agreement results in a taxable gain to the transferor, measured by the difference between the fair market value at the time of transfer, subject to certain "non recognition" provisions of the Internal Revenue Code and the ability to exempt part of all of the gain on the sale of a principal residence by an individual over 55.

A recent case decided by the U.S. Tax Court adds to the ongoing *Davis* dialogue, especially with regard to potential avoidance of adverse tax consequences by the transferor spouse. In *Beard v. Commissioner,* 77 T.C. No. 94, Tax Court was called upon to decide the income tax deductibility and includability of certain installment payments made by the former husband pursuant to a final decree of divorce, which provided, among other things, for a nearly equal split of the property which had been accumulated during marriage. In effectuating a physical division of the assets, the husband was ordered to pay the wife an immediate lump sum payment of $40,250 and an additional $310,000 payable in installments over a 121-month period. The installment payments were secured, interest bearing and were not subject to any contingencies. A separate award of contingent alimony was provided elsewhere in the decree.

The Court held, (taking into account the wife's property rights under Michigan law, the manner in which the divorce court divided the marital property, and the other surrounding facts and circumtances) that the lump sum and installment payments were in the nature of a division of capital rather than an allowance for support. Thus, they were neither includable in the wife's income nor deductible by the husband (sections 71 and 215, I.R.C. 1954). The *Beard* case has received some degree of notoriety beyond the specific outcome as outlined above. While arguably *dicta,* Judge Dawson made the following observations as contained in footnote 9 of the *Beard* opinion:

> Additionally, we think that under Michigan law Shirley acquired some sort of interest in her husband's separately titled property by virtue of her monetary and non-monetary contributions during their lengthy marriage, which interest was recognized and provided for by way of the property settlement provisions in the divorce decree. It is true, as we observed in *Schatz v. Commissioner,* T.C. Memo. 1981-341, n. 18, that her rights in the marital property have not yet become characterized by the Michigan Supreme Court as 'vested' upon the commencement of the divorce proceedings, as the Supreme Courts of certain other states have done in interpreting statutory provisions giving the spouse the right to a 'just and reasonable' or 'just and equitable' share of the marital property. . . . in the past, this Court has relied on the existence of such a 'vested' right to support a holding that periodic payments were part of the division of co-owned property for purposes of Section 71. . . . *although the present case is technically distinguishable from these cases, we question whether a different result should obtain merely because the Michigan Court has not seen fit to characterize the spouse's property rights as 'vested' upon the filing of a divorce petition.*
>
> In any event, we think that under the particular facts and circumstances of this case, Shirley did acquire an interest in her husband's property . . . as a result of her marital contributions. *However, we see no purpose to be served in attempting to classify the interest as legal or equitable, tangible or intangible, vested or non-vested, or choate or inchoate;* the fact of the matter is that the interest existed, it was recognized by the court upon divorce, and it did not derive from the husband's legal support obligation. That, in our judgment, is sufficient to support a holding that the payments attributable to that interest were in the nature of a property settlement. (Emphasis supplied.)

Judge Dawson's comments are not to be overlooked by any advocate of the position that *Davis* results in disparate tax results for comparable transactions that have occurred in different states, not to mention the often more practical problem caused by the triggering of a tax upon the transferor spouse, who may already be in a position of strained liquidity as the result of the divorce.

The *Beard* case is both illustrative of the problem and instructive upon the yet-to-be litigated issue of the possible inapplicability of the *Davis* "exchange rules" to interspousal property transfers under N.J.S.A. 2A:34-23.

John S. Eory is a partner in the firm of Forkin & Eory, Cherry Hill and news editor of New Jersey Family Lawyer.

Legislative Report

by David M. Wildstein

The current legislature continues to propose and promulgate legislation involving family law. It is necessary for our Section to monitor all proposed bills and wherever possible contribute our views. Our past efforts have been rewarding and successful. For example, during the past year our Section participated in the drafting of the wage garnishment bill (S-1508, Ch. 417, P.L. 1982) which the Governor signed into law. The input of the Family Law Section was a major factor in former Governor Byrne vetoing the rehabilitative alimony bill (S-1020) which, if signed into law, would have eliminated by inference "needs and ability to pay of the parties" as a standard relevant to an alimony award.

I am pleased to report that a group representative of our Section will appear before the Commission on Sex Discrimination, at their invitation, on March 12, 1982 to present our position on various bills that the Commission has proposed. This presents a unique opportunity for our Section to be at the forefront of the legislative process. The more significant proposed bills initiated by the Commission on Sex Discrimination are as follows:

Custody (Senate, No. 598, sponsored by Senators Lipman and DiFrancesco). This bill provides in part the following:

- Pending an order for custody, the parent who is the primary physical caretaker of the child, prior to separation, shall have custody. No child shall be taken forcibly or against the will of the parent having custody without a Court order.
- Alternative custody arrangements such as joint legal and physical custody; joint legal custody to both parents and individual physical custody to the other parent; legal and physical custody to one parent and visitation rights to the other.
- The Court shall grant joint custody when requested by both parents unless contrary to the best interest of the child.
- Guidelines and considerations by the Court in awarding custody, to wit:
  a. parental desire for joint custody;
  b. the parents' ability to agree, communicate and cooperate in matters relating to the child;
  c. the interaction and relationship of the child with its parents and siblings;
  d. the safety of the child and the safety of either parent from physical abuse by the other parent;
  e. the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;
  f. the needs of the child;
  g. the stability of the home environment offered;
  h. the quality and continuity of the child's education; and
  i. the fitness of the parents. A parent shall not be deemed unfit unless the parent's conduct has a direct adverse effect on the child.
- The Court, in determining the physical custody element of a joint custody award, shall consider, but not be limited to, the following factors: the geographical proximity of the parents' homes, the financial resources of the parents, their employment responsibilities and the age and number of the children.

Standards for Alimony and Equitable Distribution (Senate, No. 600, sponsored by Senators Lipman and DiFrancesco). This bill provides in part the following:

- Authority for the Court to grant temporary or permanent alimony based upon various standards (this portion of the bill is identical to S-1020 which was vetoed by former Governor Byrne);
- The remarriage of a former spouse receiving temporary alimony shall not be cause for termination of the temporary alimony by the Court unless the payer spouse demonstrates good cause to the contrary.
- In making an award for equitable distribution the Court shall consider but not be limited to the following factors:
  a. The duration of the marriage;
  b. The age and physical and emotional health of the parties;
  c. The income or property brought to the marriage by each party;
  d. The standard of living established during the marriage;
  e. Any written agreement made by the parties before or during the marriage concerning an arrangement for property distribution;
  f. The economic circumstances of each party at the time the division of property becomes effective;
  g. The earning capacity of each party, including educational background, training employment skills, work experience, length of absence from the job market, custodial responsibilities for children, opportunity for future acquisitions of capital assets and income, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;
  h. The contribution by each party to the education, training or increased earning power of the other;
  i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contributions of a party as a home-

Legislative Report *(continued)*

maker;

j. The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits, whether vested or unvested;
k. The tax consequences of the proposed distribution to each party;
l. Whether the property award is in lieu of or in addition to alimony, maintenance or child support;
m. The current value and income producing capacity of the property;
n. The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own its household effects;
o. The debts and liabilities of the parties; and
p. Such other factors as the court may deem relevant.

- It shall be presumed that each party made a substantial contribution to the acquisition of income and property while the party was married.

Debts and Property of Married Persons (Senate, No. 597, sponsored by Senators Lipman and DiFrancesco). A summary of the bill follows:

- A husband and wife have the power to contract with each other and sue or be sued by one another. The spouses shall not enter into an employer-employee agreement with each other for marital or domestic services in their own home.
- The wages and earnings of a married person are that person's separate property.
- A purchase made by a spouse in the spouse's own name shall be presumed, in the absence of notice to the contrary, to be made by that spouse as an individual and that spouse shall be liable for the purchase except for medical, housing and necessities for the family.
- If a spouse is providing reasonable support during a separation, no action may be obtained against the payer spouse during or after the separation for liability incurred by the other spouse.
- A spouse who abandons the other spouse is liable for the reasonable support of that spouse during the period of abandonment.

Children Born Out of Wedlock (Senate, No. 888, sponsored by Senator Lipman).

This bill is comprehensive and intends to provide that all children, regardless of the marital status of the parents, have equal rights with respect to each other and also provides a procedure to establish parentage in disputed cases. The bill also provides in part for the following:

- A procedure for change in birth certificates and name changes.
- Support guidelines for out-of-wedlock children including the right if it is in the best interest of a child, to a lump sum payment or the purchase of an annuity in lieu of periodic support.

The enactment of these bills would have substantial impact upon the practice of family law. In my next column, I will report on our meeting with the Commission and the status of these and other bills. I suspect that there will be much work ahead for all of us and in particular the appropriate substantive Section committee that will study and evaluate the bills.

Chairman's Report

(continued from page 98)

of the Section, that I accepted Senator Lipman's invitation to have representatives of the Section meet with the full Commission on Sex Discrimination in the Statutes. The meeting took place on Friday, March 12. Representing the Section in addition to myself were Section Vice-Chairman Jeff Weinstein, Section Secretary Dave Wildstein, Vince Segal of Cherry Hill and Patricia Slane Voorhees of Princeton. Also in attendance with our Section's delegation were State Bar staff members Phil Kirschner and Joanne Ventura. No fewer than six of the seven members of the Commission were also present.

The meeting was marked by wide-ranging discussions in which the Commission indicated a willingness to place on hold all of its legislative package dealing with family law until the Section has had an opportunity to carefully consider each bill. It was agreed that certain bills would be considered in a two-month time frame, while others would be considered in a four-month time span.

Let there be no doubt about it, the bills in question pack powerful punches. For example, Senate Bill 600 proposed by Senators Lipman and De Francesca would substantially expand the standards for the award of not only alimony and child support, but also equitable distribution of property. Indeed, on the equitable distribution front, the bill contains the following language which would have an obvious impact upon equitable distribution law:

> It shall be presumed that each party made a substantial contribution to the acquisition of income and property while the party was married.

The proposed legislation also contains the following interesting section which deserves careful and balanced consideration:

> The remarriage of a spouse receiving temporary alimony shall not be cause for termination of the temporary alimony by the Court unless the payer spouse demonstrates good cause to the contrary.

Obviously, I have grave misgivings both about the presumption dealing with equitable distribution and the suggestion that remarriage of a former spouse will no longer signal the automatic termination of alimony. Indeed with regard to the latter,

Chairman's Report *(continued)*

I find it curious that the legislation as drafted would force the supporting spouse to demonstrate good cause why his support obligation to the now remarried supported spouse should terminate. Has the world turned upside down?

Similarly proposed within Senate Bill 598 dealing with custody is the following troublesome language:

> Until the Court determines the custody of the child and unless the parties agree otherwise, the parent who has been the primary physical caretaker of the child prior to separation shall have custody of the child. No child shall be taken forcibly or against the will of the parent having custody by the other parent without a Court Order.

While the clause as drafted is intended to simplify the area of custody practice, I question whether the litmus paper test proposed would serve the best interests of our state's children. Additionally, I am troubled that the proposed legislation would create a new term of art—"primary physical caretaker"—just at the time our practice is beginning to turn away from traditional labels of "custody" and "visitation." The Pashman Report, as well as the *Beck* opinion, did much to rid New Jersey of traditional possessory concepts which have dominated custody practice for decades. Although I am editorializing, I for one feel that the legislation as drafted would represent a regression in our law.

Fortunately, however, our Section has "involved itself" at an early enough stage in the legislative process to have an impact upon the bills before it is too late. A massive Section effort will be required. This is not a situation in which lawyers should assume the role of negativists; instead, this is a situation in which concerted creative thought will be required. I will be calling upon the chairmen of our Section's substantive law committees to address each and every proposal now before the Legislature dealing with our practice. I have committed our Section to furnishing the Commission on Sex Discrimination in the Statutes, the applicable legislative committees, and the Legislature itself with detailed briefing memoranda as to each law proposed. Future columns in the *Family Lawyer* will deal with this massive effort over the next four-month period.

Concern Expressed Over Introduction of Referees in Domestic Relations Court

In addition to concern over recent legislative developments, I must express great concern about a recent judicial development in Atlantic County. Relying upon authority pursuant to R. 5:9, as well as R. 5:10-3, the Atlantic County Assignment Judge has implemented an experimental program involving the use of referees in domestic relations matters. Citing as the program's intention the maximization of available judicial time, referees are called upon to conduct in the first instance hearings which in other counties are held before Domestic Relations Court judges. I have grave misgivings about this development. Although a de novo review of a referee's findings seems to be built into the system, I proceed from the basic premise that judging should be left to judges and that the judicial function should not be farmed out. I am particularly concerned about this development as we approach the eve of the implementation of a Family Court. I pose the rhetorical questions: Can one procedure be used in a combined Family Court in domestic relations matters, while another procedure is followed in a matrimonial matter? Are the factors which bear upon the issuance of a support, custody or visitation Order in the Domestic Relations Court all that different from similar applications heard in the Superior Court? I think not.

It is not, however, for me as Section Chairman to impose my views with regard to this topic upon our Section's membership. Instead, I view this important topic as one which deserves immediate and thorough study. Accordingly, I have appointed Section Vice-Chairman Jeff Weinstein to head a blue-ribbon panel having statewide representation. It is my hope that Jeff's committee will proceed in the same fashion as did Gary Skoloff's committee dealing with the retainer rule. Already, the committee has interviewed Atlantic County Assignment Judge Philip Gruccio, who has cooperated fully with the committee's investigation. I am hopeful the commitee will be prepared to submit its report to the April meeting of our Section's Executive Committee for action. As always, you will be kept fully posted as to all developments as they occur.

Section Appointments Announced

I am very pleased to announce a number of additional appointments I have made during the past month. First, continuing my effort to expand our Executive Committee to include representatives from throughout the state, I have appointed Frank A. Louis of Toms River to serve on our Executive Committee. Similarly, I have appointed Robert Diamond of Union to our Executive Committee and have also asked him to chair a new substantive law committee which will deal with causes of action. I will be asking his committee to consider the desirability of our Section's endorsement of legislation which would shorten the 18-month separation period.

I have also asked Section Executive Committee member Lynne Strober of Belleville to chair a new committee to deal with the rights of divorced persons. Finally, I have asked Executive Committee member Allen Zeller of Camden to chair a committee to deal with the responsibility of private practitioners to offer pro bono services in the matrimonial field to the less advantaged.

My thanks to each of these individuals for having accepted their respective assignments. It is gratifying that so many are willing to give of themselves to the work of the Section.

Equitable Distribution in North Carolina

by Alan M. Grosman

North Carolina joined the ranks of the equitable distribution states on October 1, 1981, when its Act for Equitable Distribution of Marital Property took effect.[1] This detailed and comprehensive statute clearly shows that it is the result of com parative study and that its drafters benefited from the experience of other common law states with equitable distribution during the preceding decade. The North Carolina Equitable Distribution Act contains many familiar provisions, but also some unique ones.

Davis Treatment

The Act is most innovative in its effort to avoid the capital gains taxation problem posed by *United States v. Davis*[2] with regard to appreciated property transferred by one spouse to the other in connection with a divorce settlement or judgment. Taking inspiration from the Tenth Circuit decisions of *Collins v. Commissioner of Internal Revenue*[3] in Oklahoma and *Imel v. United States*[4] in Colorado, the statute declares that , "The rights of the parties to an equitable distribution of marital property are a *species of common ownership,* the rights of the respective parties *vesting at the time of the filing of the divorce action."*[5] (Emphasis added)

This attempt to legislate on the state level against the harmful effects of the *Davis* decision should be seriously considered by New Jersey legislators. Why should parties who obtain divorces in the common law states of Oklahoma, Colorado and North Carolina be able to do so free of the effects of the *Davis* decision, while similarly situated persons living in New Jersey remain subject to its disabilities?

Distributive Award

The statute employs the "distributive award" concept, which was first formally introduced in the New York Equitable Distribution Law in 1980.[6] A distributive award is defined as payments either in a lump sum or over a period of time in fixed amounts, but not including payments that are treated as ordinary income to the recipient under the Internal Revenue Code.[7] It is clear that alimony or maintenance does not qualify as a distributive award.

Where the court finds that an equitable distribution of all or part of the marital property in kind would be impractical, as in the cases of a business operated and controlled by the other spouse and of a professional practice, the court is to provide a distributive award to achieve equity. This may be done to facilitate, effectuate or supplement a distribution of marital property. This represents codification by North Carolina of the approach developed in New Jersey by case law in *Borodinsky v. Borodinsky.*[8] The North Carolina court, like the New Jersey court, has the power to provide that any distributive award payable over a period of time be secured by a lien on specific property.[9]

Alan M. Grosman is a member of the firm of Grosman & Grosman, Short Hills and an editor of the New Jersey Family Lawyer.

Statutory Presumption of Equal

What is the meaning of "equitable" under the new North Carolina statute? There is statutory presumption that equitable means equal. The North Carolina Equitable Distribution Act requires that there be an equal division by using the net value of marital property *unless* the court finds that an equal division would not be equitable.

In that event the court must divide the marital property equitably, considering the following very inclusive set of criteria:[10] (1) the income, property and liabilities of each party at the time the division of property is to become effective; (2) any obligation for support arising out of a prior marriage; (3) the duration of the marriage and the age and physical and mental health of both parties; (4) the parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects; (5) vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property; (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditues and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker; (7) any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other; (8) any direct contribution to an increase in the value of separate property which occurs during the course of the marriage; (9) the liquid or nonliquid character of all marital property; (10) the difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party; (11) the tax consequences to each party; and (12) any other factor which the court finds to be just and proper.

The North Carolina statute specifically requires the court to provide for an equitable distribution of marital property without regard to alimony or child support. After equitable distribution is decided, these matters are to be considered. This is a codification of the New Jersey approach as set forth in the leading case of *Rothman v. Rothman.*[11]

"Contracting Out"

The Act also contains an important provision allowing couples to make their own binding equitable distribution agreement. The law thus enables spouses and prospective spouses to "contract out" of the statutory scheme. This pro-

Equitable Distribution in North Carolina *(continued)*

vision resembles a provision in the 1980 New York equitable distribution statute and similar rules of long-standing in most community property states. The North Carolina Act provides that before, during and after marriage the parties may, by written agreement, provide for the distribution of the marital property in the manner that they consider fair. It further states that that agreement shall be binding upon the parties.

Such a provision might be desirable for New Jersey. The old rules about ante-nuptial agreements may well be found to be as outmoded as the doctrine of recrimination. Perhaps a statute affirmatively authorizing "contracting out" of our equitable distribution and alimony system might be a worthwhile development.

In the only reported decision about the new North Carolina statute, *Mims v. Mims,*[12] decided by the North Carolina Supreme Court in January, 1982, the court stated that it appeared that in the context of all "marital property" the legislature has opted for a rule that where land or personalty is purchased with the "separate property" of either spouse, it remains the separate property of that spouse regardless of how the title is made.

New Jersey family lawyers should observe the North Carolina experiment with overcoming *Davis* and with "contracting out" of the matrimonial property regime with interest as possible guides for further New Jersey family law reform.

Footnotes

1. An Act for Equitable Distribution of Marital Property, ch. 815, 1981 Session Laws, adopted July 3, 1981.
2. 370 U.S. 65 (1962).
3. 412 F.2d 211 (10th Cir. 1969).
4. 523 F.2d 853 (10th Cir. 1975). In both *Collins, supra,* fn. 3 and *Imel* the Tenth Circuit held that the Legislatures of Oklahoma and Colorado, respectively, intended equitable distribution to mean that a wife has a *vested interest* in her husband's property at the time a divorce action is filed and, based upon this vested interest, found the divorce property distributions to be nontaxable.
5. N.C.G.S. §50-20 (k).
6. DRL §236 (b) (5) (e) provides that in any action in which the court determines that an equitable distribution is appropriate, but would be impractical or burdensome or where distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution is to make a distributive award so as to achieve equity between the parties. In addition, under the 1980 New York Equitable Distribution Law, the court may also make a distributive award to supplement, facilitate or effectuate a distribution of marital property.
7. N.C.G.S. §50-20 (b) (3).
8. 162 N.J. Super. 437, 393 A.2d 583 (App. Div. 1978).
9. N.C.G.S. §50-20 (e).
10. N.C.G.S. §50-20 (c).
11. 65 N.J. 219, 320 A.2d 496 (1974).
12. 8 FLR 2200 (2/23/82).